

ONE HUNDRED SIXTH LEGISLATURE - SECOND SESSION - 2020
COMMITTEE STATEMENT
LB247

Hearing Date: Friday February 01, 2019
Committee On: Judiciary
Introducer: Bolz
One Liner: Adopt the Advance Mental Health Care Directives Act

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:
Aye: 8 Senators Brandt, Chambers, DeBoer, Lathrop, Morfeld, Pansing Brooks, Slama, Wayne
Nay:
Absent:
Present Not Voting:

Oral Testimony:

Proponents:
Senator Kate Bolz
Shannon Seim
Loren Knauss
Jacob Dahlke
Denise Rieder

Representing:
Introducer
Self
National Alliance on Mental Illness Nebraska
Nebraska Medicine
Douglas County Sheriffs Office

Opponents:
Brad Meurrens

Representing:
Disability Rights Nebraska

Neutral:
Ramzi Hynek
Kim Robak

Representing:
Nebraska Bar Association
Nebraska Medical Association and Nebraska Methodist Hospital

Summary of purpose and/or changes:

Section 1 Title: Advance Mental Health Care Directives Act.

Section 2 Findings: Mental health planning Issues different from end of life care, episodic so informed consent difficult, advantages of advance planning, advance directives protect autonomy and health

Section 3 Declaration: Directives only work if mental health instructions included, indicate if revocable, standards when directive becomes effective, designates an agent and lists all health care professionals, family and friends who communicate with treatment providers.

Section 4 Definitions

Agent: individual designated and authorized to make mental health care decisions.

Capacity: Individuals ability to understand nature and consequences of care decisions

Principal: Person who confers directive authority to agent

Section 5 Findings: Decision making capacity is relative to demands of health care decision and possible to lose capacity without civil commitment.

Section 6 Statement that a person has right to control mental health care.

Section 7 Requirements for mental health care directive: Written, dated and signed, indicate whether revocable or irrevocable and two witnesses. Is valid upon execution. To be irrevocable, directive must state that it remains irrevocable during incapacity. Witnesses cannot be related, in a romantic relationship, part of the treatment team, an agent, connected to principals treatment center. Witnesses attest that the principal was not incapacitated. Directive may list health care professionals, family friends with whom treatment providers may communicate.

Section 8 Directive becomes effective when principal loses capacity but may designate an alternative standard. Directive does not control over preferences when principal is capable.

Section 9 Agent may be appointed to make mental health care decisions including consent to treatments and medication. Agent's decisions must be in best interests of the principal and consistent with the directive. If the principal still has capacity, principal's decision overrides agent's. Agent's decision effective without judicial approval.

Section 10 Principal may not designate person connected to treatment facility as agent.

Section 11 Advance mental health directive may include preferences concerning treatment facilities, appointment of a guardian, but may not consent to psychosurgery.

Section 12 Directive remains in effect until expires according to terms or is revoked. May be revoked even if incapacitated unless made irrevocable during incapacity. Revocation, either with or without capacity requires: written statement, subsequent directive, or destruction of directive with intent to revoke. Decision inconsistent with directive does not revoke but acts as a waiver of inconsistent provision.

Section 13 Allows for a self binding arrangement in event of an acute episode rendering the principal incapacitated. In this situation the directive must be irrevocable, consent to inpatient treatment, must expressly consent to medication despite illness induced refusal. If self binding arrangement indicates inpatient treatment that is refused during illness may create a rebuttable presumption that the principal is incapacitated. In such a situation, the facility shall contact the agent if any for consent, health care professionals shall evaluate principal to determine capacity and if capacity is lacking shall admit principal.

Explanation of amendments:

AM 2206 is a white copy amendment to LB 247 that reorganizes and makes several changes to the original bill. Below is the section by section and at the end of each description is the location in the original bill and any significant changes.

Section by Section (AM 2206)

Section 1 Title: Advance Mental Health Care Directives Act. Same as Section 1 of original bill.

Section 2 Findings and purpose: Mental health planning Issues different from end of life care, episodic so informed consent difficult, advance directives protect autonomy and health. Similar to Section 2 of original bill, but new subsection divisions and numbers. Also adds language from Section 5(2) of original, a statement that can lose capacity without civil commitment. Rewrites Section 2(5) of original bill.

Section 3 Declaration: Directives only work if mental health instructions included, indicate if revocable, standards when directive becomes active. Similar to section 3 of original but new subsection divisions and numbers. Adds a new subsection (1) (d) to provide for a HIPAA waiver included in the directive. Moves Section 6 of the original version to a

new (2).

Section 4 Definitions

Activation: New subsection that defines point when directive is used for decision making.

Attorney in fact: individual designated and authorized to make mental health care decisions. (Replaces definition of agent with attorney in fact (power of attorney))

Capacity: Individuals ability to understand nature and consequences of care decisions. Adds new (ii) to ability to communicate decisions. Also adds language from 5(1) of original bill that capacity evaluated in relation to demands of particular mental health decision.

Principal: Person who confers directive authority to agent. Rewrites and adds age requirement of nineteen.

Relative: Adds new subsection (5) that defines relatives spouse, parent, child, grand child and parent related by blood, marriage, or adoption.

Section 5 Requirements for mental health care directive: Written, dated and signed, indicate whether revocable or irrevocable and two witnesses. Requires notarization. Is valid upon execution. To be irrevocable, directive must state that it remains irrevocable during incapacity. Witnesses cannot be related, in a romantic relationship, part of the treatment team, an attorney in fact, connected to principal's treatment center. Witnesses attest that the principal was not incapacitated. Directive may list health care professionals, family friends with whom treatment providers may communicate. Was section 7 of the original bill, replaces agent with attorney in fact, provides provisions if principal unable to sign and provides for a HIPAA release.

Section 6 Advance mental health directive may include preferences concerning treatment facilities and providers, but may not consent to psychosurgery. Consent for electroconvulsive therapy must be specifically expressed. From Section 11 of original bill and adds references to attorney in fact. Subsection (1)(b) expands items that may be included in directive regarding treatment facilities and health care providers. Also adds new language regarding HIPAA release to include instructions on release of information.

Section 7 Directive remains in effect until expires according to terms or is revoked. May be revoked even if incapacitated unless made irrevocable during incapacity. Revocation, either with or without capacity requires written statement or subsequent directive. Decision inconsistent with directive does not revoke but acts as a waiver of inconsistent provision. From section 12 of original bill. Removes physical destruction as a method of revocation.

Section 8 Allows for a self binding arrangement in event of an acute episode rendering the principal incapacitated. To authorize in patient treatment the directive must be irrevocable, consent to inpatient treatment, must expressly consent to medication despite illness induced refusal. From Section 13(1 and (2) of original bill.

Section 9 Directive becomes active when principal loses capacity but may designate an alternative standard. From section 8 of original bill.

Section 10 A new section to allow the attorney in fact to consent to inpatient care and psychotropic medication without a specific grant of authority if general authority is broad enough. If incapacitated principal refuses inpatient or medication, attorney in fact can authorize if directive irrevocable. Cannot authorize electroconvulsive unless specifically authorized in directive. If a principal has capacity, principal decision overrides attorney in fact.

Section 11 A new section that provides that a principal with capacity prevails over the directive even if irrevocable and if a principal has both a power of attorney for health care and a directive, the directive prevails over the general for mental health instructions.

Section 12 Allows for self binding arrangement for inpatient treatment, but if principal refuses, facility obtains consent of attorney in fact, two physicians evaluate and if principal incapacitated, admitted pursuant to directive. If admitted, after 21 days, if has not regained capacity or refuses additional treatment, principal is released unless kept under involuntary commitment standards. Directive may indicate period shorter than 21 days. From section 13(3) and 14(2) and (3) of original bill. Original 35 days reduced to 21.

Section 13 If principal with irrevocable directive refuses psychotropic medication, only a psychiatrist may administer if: expressly consented in directive, attorney in fact consented and two qualified health care professionals recommends in writing. From section 15 of original version, replaces agent with attorney in fact.

Section 14 New section that provides for liability limitations (criminal/civil/disciplinary) for health professionals acting within reasonable medical standards, good faith reliance on directive or attorney in fact. Provides no liability limitations for health professionals or attorneys in fact for negligent acts or omissions.

Section 15 New section that provides for a form for the directive. Also provides for HHS to adopt rules and regulations for information about directives.

Section 16 New section that amends 30-3402 to include mental health care in the definition of health care and provide an exception for the definition of incapable . Adds a subsection (9) that provides a definition on mental health care.

Section 17 New section that amends 30-3405 to limit witnesses to a health care power of attorney.

Section 18 New section that amends 30-3406 to limit who may be an attorney in fact.

Section 19 New section that amends 30-3408 (Health Care Power of Attorney form) to allow inclusion of mental health directive.

Section 20 New section that amends 30-3423 to include mental health directives in limits of liability for attorneys in fact.

Section 21 Repeals original sections.

Steve Lathrop, Chairperson